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No. 1136

In the
Supreme Court of the United States
October Term, 1965.

222 EAST CHESTNUT STREET CORPORATION,
Petitioner,

vs.

LA SALLE NATIONAL BANK, not personally but as Trustee, under Trust No. 17365, and AARON B. WEINER,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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222 East Chestnut Street Corporation prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled case on October 27, 1965.

Citation to Opinion Below

The District Court granted petitioner's motion for a directed verdict and did not write an opinion. The opinion of the Circuit Court of Appeals, printed in Appendix A hereto, *infra*, pp. 1a-6a, is reported in 353 F. 2d 680.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on October 27, 1965, p. 1a, *infra*. Rehearing was denied on December 30, 1965. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

Questions Presented

Petitioner filed a suit in an Illinois state court (hereinafter referred to as the "Underlying Suit") to review a zoning variation order granted to respondents who had sought to build in violation of the local zoning ordinance and had obtained the variation order, issued without adequate findings as required by statute.* The zoning law, as interpreted by Illinois courts at the time the stay order was granted, gave to any property owner in the same contiguous zoning district the right to institute proceedings to prevent zoning violations, and held void any variation order granted without specific findings. While this action was pending and undetermined on appeal before the Illinois Supreme Court, a full hearing on motion for supersedeas was held before Justice Schaefer of that court. Both petitioner and respondents were represented and participated in that hearing. In their objections to the motion for the supersedeas order, respondents relied on petitioner's failure to have proved, before the Zoning Board of Appeals, the allegations of "special damage" set forth in the complaint in the Underlying Suit.** (App.

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* Ill. Rev. Stat. 1955, Ch. 24, § 73-4. Appendix C, *infra*, p. 11a.

** The only evidence which could have "proved" those allegations was that introduced in the hearing before the Zoning Board of Appeals. Thus all of the evidence was equally before Justice Schaefer at the time of the hearing on the motion for supersedeas. Ill. Rev. Stat. 1955, Ch. 110, § 274, Appendix C, *infra*, pp. 13a-14a.

92.)* Mr. Justice Schaefer, acting for the Supreme Court of Illinois after that full hearing, granted the order staying respondents' alleged illegal construction, thus in effect determining that probable cause existed for petitioner's Underlying Suit. It is this stay order (printed herein as Appendix D, *infra*, pp. 15a-16a) that forms the basis for respondents' claim.

The Underlying Suit was dismissed by the Illinois Supreme Court on the ground that petitioner lacked standing to sue, having failed to establish special damage.

Respondents sued in the federal District Court on diversity grounds, alleging that petitioner had maliciously prosecuted the Underlying Suit. The case was tried to a jury, and petitioner's motion for a directed verdict was granted at the close of respondents' case. The District Court held that respondents failed to show lack of probable cause. The Court of Appeals reversed and remanded, without citing any federal or state law dealing with the division of function between judge and jury in deciding the issue of probable cause where the facts are not in dispute.

After considering the undisputed facts which were before the petitioner at the time the Underlying Suit was filed, the District Court had determined that respondents proposed to utilize their property in an apparently illegal manner, and that this proposed conduct of respondents gave petitioner probable cause, as a matter of law, to seek judicial review. (App. 260-1) The question of whether the sum of the undisputed facts constitutes probable cause is peculiarly for a court to determine.

The Court of Appeals in the instant opinion has denied to the trial court the right to make this legal determination.

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* All citations to "App." refer to the "Appendix To Brief for Plaintiffs-Appellants," filed in the Court of Appeals.

Thus the questions presented are:

1. In a civil action for malicious prosecution where jurisdiction of the federal District Court is based upon diversity of citizenship, should the federal court, notwithstanding *Byrd* v. *Blue Ridge Rural Elec. Coop.*, 356 U.S. 525 (1958), apply state law governing the division of functions between judge and jury in deciding the question of probable cause?

2. Did the Court of Appeals for the Seventh Circuit err in failing to apply the Illinois law on probable cause?

3. Where a plaintiff in a malicious prosecution suit had obtained an administrative order which was subject to judicial review, is the defendant's probable cause for seeking judicial review always a matter for jury determination, or should a federal court apply state rules and determine, as a matter of law, that the defendant had probable cause, despite subsequently determined lack of standing?

4. Does a federal District Court have inherent power to find, as a matter of law, that a defendant in a civil malicious prosecution action had probable cause or must this issue always be left to a jury, even where the evidence is undisputed?

5. Should this Court examine the law of malicious prosecution as applied to such matters as zoning actions, where the public interest can be protected only by private actions, and grant to the federal District Courts the power to direct verdicts where lack of probable cause has not been shown?

STATEMENT OF FACTS

This suit was brought to recover $1,000,000 actual and $1,000,000 punitive damages for the alleged malicious prosecution by 222 East Chestnut Street Corporation, petitioner herein, of a civil suit for judicial review of an order of the Chicago Zoning Board of Appeals granting a zoning variation to the respondents. The jurisdiction of the District Court was invoked because of diversity of citizenship, 222 East Chestnut Street Corporation being incorporated under the laws of Delaware, the LaSalle National Bank having its principal place of business in Illinois, and Aaron Weiner being a citizen of Illinois. (App. 3.)

The petitioner owns and operates a nineteen-story apartment building located at 222 East Chestnut Street, Chicago, Illinois. (App. 300.) On December 30, 1954, Aaron B. Weiner purchased property at 253 East Delaware Place in Chicago (App. 139.); the property was placed in a land trust with the LaSalle National Bank as trustee and Mr. Weiner as the sole beneficiary. (App. 400-1.) The petitioner's apartment building and Mr. Weiner's property were located in the same apartment house zoning district, as designated by the applicable Chicago zoning ordinance. (App. 302.)

At the time in question, a Chicago zoning ordinance required a ten per cent front-line setback on Mr. Weiner's property. (App. 301-2.) Mr. Weiner applied to the Chicago Building Commissioner for a building permit allowing him to build to the front lot line without any setback. (App. 64-7.) The application was denied (App. 68.) and Mr. Weiner then applied to the Chicago Zoning Board of Appeals for a variation from the front-line setback regulation. (App. 263-6.)

At the time, the Illinois Cities and Villages Act gave to an owner of property in the same zoning district a statutory right to institute proceedings to prevent zoning *violations*. (Ill. Rev. Stat. 1955, Ch. 24, § 73-9)* The variation granted to respondents appeared to be void for failure to comply with a statute requiring "findings of fact specifying the reason or reasons for making the variation." Ill. Rev. Stat. 1955, Ch. 24, § 73-4**; *Lindburg* v. *Zoning Board of Appeals,* 8 Ill. 2d 254, 133 N.E. 2d 266 (1956).

Public administrative hearings were held at which petitioner appeared by counsel and objected to the requested variation. (App. 168.) At the hearing, no objection was made by the Board or by Mr. Weiner's counsel to petitioner's participation. On March 13, 1956, the Board of Appeals allowed the variation. (App. 288, 295-8.) The Board's opinion contained no "findings of fact specifying the reason" for the decision. (App. 295-8.)

On March 29, 1956, the petitioner filed under the Illinois Administrative Review Act (Ill. Rev. Stat. 1955, Ch. 110, §§ 264-279) an action in the Superior Court of Cook County for judicial review of the Zoning Board's order. (App. 285-298.) This is the Underlying Suit. The Superior Court upheld the Board's decision on the ground that the Board's findings were not against the manifest weight of the evidence. (App. 342-3) The Superior Court did not question petitioner's standing to sue. (App. 341-3.) On appeal, the Illinois Supreme Court held that the petitioner lacked "standing" to challenge the variation order because petitioner had not proved that it would be "damaged" by the Board's decision. *222 East Chestnut Street Corp.* v. *Board of Appeals,* 10 Ill. 2d 132, 139 N.E. 2d 218 (1956). (App. 325-8.)

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* Appendix C, *infra,* p. 11a-12a.
** Appendix C, *infra,* p. 10a-11a.

The parties to this action have been involved in several other suits, none of which is relevant to this case. (See Appendix B, *infra*, pp. 7a-9a). The only action alleged to have been maliciously prosecuted is the Underlying Suit.

The District Court in the instant case granted petitioner's motion for a directed verdict at the close of the respondents' evidence, on the ground that the evidence showed petitioner had probable cause to institute the original suit. (App. 260.) The Court of Appeals reversed and held that the question of probable cause should have been submitted to the jury. (Appendix A, *infra*, pp. 1a-6a).

The history of petitioner's attempts to obtain judicial review of the claimed invalidity of the variation order is in part set forth in the opinion of the Court of Appeals. It is clear from this opinion that a sense of irritation with those attempts led the Court of Appeals to equate petitioner's search for judicial protection with unreasonable conduct, and to create an atmosphere in which petitioner's rights were ignored.* The most fundamental of rights is involved: the right of access to the courts to challenge action subject to judicial review, free from the fear that a jury in a malicious prosecution suit may be allowed to equate with lack of probable cause for seeking judicial review, a subsequently determined lack of "standing" to seek judicial review.

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* This attitude of the Court of Appeals should be contrasted with other distinguished authority, approving, even applauding conduct similar to that of the petitioner:

Southern Pacific Co. v. *Bogert*, 250 U.S. 483, 489 (1919)

"Here plaintiffs, or others representing them, protested as soon as the terms of the reorganization agreement were announced; and ever since, they have *with rare pertinacity and undaunted by failure persisted in the diligent pursuit of a remedy* as the schedule of the earlier litigation referred to in the margin demonstrates." (emphasis added)

The Decision of the Court of Appeals

The opinion of the Court of Appeals cites no law upon any issue except that lack of probable cause is proved by evidence, and that on a motion for directed verdict the evidence and the inferences therefrom are taken most favorably for the opponent of the motion. Neither issue is presented in this case.

The discussion of the other litigation between the parties is not material or relevant to the issue of probable cause for instituting the Underlying Suit. This discussion serves only to disclose an atmosphere inimical to a proper judicial determination of the important legal issues involved.*

The opinion never touches the keystone issue of the right of the District Court to direct a verdict where the conduct of the respondents was not disputed, where the legal issue was a property owner's probable cause, in reliance upon Illinois law, to seek judicial review of that conduct.

The opinion frames an issue of fact on what are referred to as "material allegations" made under oath in the petition for judicial review. These were allegations that the variation order

> ". . . would impair and depreciate the value and use of plaintiff's property in the following, among other, respects:

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* The Court of Appeals repeatedly referred, with obvious irritation and displeasure, to the previous lawsuits between petitioner and respondents and to the fact that petitioner failed to prevail in those suits. In making those references the Court of Appeals overlooked or disregarded its statement, set forth in 267 F. 2d 247 at 254, that ". . . in neither the Zoning Variation Suit (56 S 5518) nor in the State Court Injunction Suit (56 S 4196) was there any determination on the merits against 222 [petitioner]."

(i) It would interfere with the securing to plaintiff's property of adequate light, pure air and safety from fire and other dangers.

(ii) It would diminish the taxable value of the land and building constituting plaintiff's property and of other neighboring properties.

(iii) It would increase congestion in the public streets, particularly near and in front of plaintiff's property.

(iv) It would interfere with the promotion of the public health, safety, comfort, morals and welfare, being the general objectives of the zoning ordinance of the City of Chicago, and the enabling legislation therefor." (App. 288-9.)

As the allegations themselves indicate, they were phrased in terms of the generalized, conclusory objectives of the Illinois statute. Ill. Rev. Stat. 1955, Ch. 24, § 73-1.*

No less than three times the opinion of the Court of Appeals refers to the possible falseness of these allegations: first, in attributing to respondents the production of evidence tending to prove that material allegations in the complaint were not true and that petitioner's officers knew they were not true; second, in describing respondents' theory of the case; and third, in describing what the jury might have found under the evidence presented. The opinion of the Court of Appeals then leaves to the jury the question whether these allegations were included because of a belief by petitioner that they were essential to its standing to sue.**

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* Appendix C, *infra*, p. 10a.

** The Court of Appeals has made petitioner's belief in its standing to sue the determinative question on probable cause, and has left this question to the jury. This is repugnant both to common sense and to the law of Illinois. In Illinois the law is clear that probable cause arises from "circumstances sufficiently strong to induce the belief in the mind of a reasonably cautious person that

This issue, even if resolved against the petitioner by the jury, would not constitute lack of probable cause. Probable cause as a matter of law arose from the action taken by respondents, action subject to judicial review. Lack of probable cause could not, in this case, be proved by petitioner's state of mind as to its standing to sue, in the light of the confused state of Illinois zoning law as to who had standing to sue. Respondents' conduct and the confused state of Illinois zoning law are relevant to a court's determination of what constitutes probable cause, but they do not present questions within the competence of the jury.

Without any state precedents to guide it, the Court of Appeals for the Seventh Circuit has decided that lack of standing to sue constitutes lack of probable cause, and has rejected the principle, firmly established in Illinois law, that the conduct of the respondents, not the standing of the petitioner, determines probable cause.

The decision of the Court of Appeals constitutes a direct threat to the right of every person to seek the protection of the courts. It will discourage members of the public from complaining either of civil wrongs or criminal offenses. Petitioner has found no case since *Crescent City Live Stock Co.* v. *Butchers' Union Slaughter-House Co.*,

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** (Continued)
the defendant in the prosecution was guilty of the particular offense charged." *Glenn* v. *Lawrence,* 280 Ill. 581, 587, 117 N.E. 757, 759 (1917). It was the "guilt," or conduct *of the respondents* that gave rise here to petitioner's probable cause to charge respondents with seeking to use their property in an illegal manner. The lack of probable cause could not be proved by what petitioner thought *it* had to allege, or prove, to have "standing" to make that charge.

120 U.S. 141, 149 (1887) in which this Court has passed upon the questions of law involved in a malicious prosecution action. That case stated the rule to be "And when there is no dispute of fact, the question of probable cause is a question of law for the determination of the court." The Court of Appeals in the instant case has departed from this rule. It is a vital, salutary rule which should be affirmed.

REASONS FOR GRANTING THE WRIT

I.

The Instant Case Presents an Important Question Concerning the Scope of Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525 (1958).

The question presented by this case is whether in a diversity case based on a claim of malicious prosecution, the federal courts should apply state rules governing the division of functions between judge and jury and assigning to the judge the decision on the issue of probable cause where the evidence on that issue could not be disputed.

This Court has already noted, without deciding, the importance of a closely analogous question—whether federal courts in diversity actions should apply state or federal standards as to the *quantum* of evidence necessary for submission to a jury. *Dick* v. *New York Life Ins. Co.*, 359 U.S. 437, 444-45 (1959), as interpreted by Judge Friendly in *Arrowsmith* v. *United Press Int'l.*, 320 F.2d 219, 230 (2d Cir. 1963).

A.

Illinois Law Leaves to the Judge the Determination of the Issue of Probable Cause Where No Dispute as to the Facts Exists.

Illinois courts have established the rule in malicious prosecution actions that the question of lack or presence of probable cause is for the judge to decide where there is no disputed evidence relevant to the issue. In *Brown* v. *Smith*, 83 Ill. 291, 293 (1876), the Illinois Supreme Court said:

> "The question of probable cause is made up of law and fact, it being the province of the jury to determine the circumstances alleged, to be true or not, and of the court to determine, whether they amount to probable cause."

The court then quoted with approval from an opinion of the Court of Appeals of New York holding that "The question of probable cause is one of law, and not of fact," 83 Ill. at 294.*

The undisputed facts upon which probable cause here rested were

(1) the variation order obtained by respondents;

(2) the absence of specific findings in that order;

(3) the location of petitioner's and respondents' properties in the same zoning district; and

(4) the state of Illinois zoning law and the purposes of zoning ordinances.

There can be no dispute as to these facts, which relate solely to *the conduct of the respondents.* They are the facts which, as a matter of law, would lead a reasonably cautious man to conclude that respondents were "guilty" of the conduct with which they were charged in the Underlying Suit. They are the only facts relevant to the issue of probable cause.

There can be no relevant dispute of *fact* whether or not petitioner had suffered special damage. All of the evidence on this issue was already before the court which had to determine it. The Illinois Administrative Review Act limits

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* The obvious corollary of this rule is that where there are disputed issues of fact, these issues must be resolved by a jury. *Freides* v. *Sani-Mode Mfg. Co.*, 33 Ill. 2d 291, 294, 211 N.E. 2d 286, 288 (1965).

judicial review of administrative action to the record made before the Zoning Board of Appeals (Ill. Rev. Stat. 1955, Ch. 110, § 274).* This record was made before the filing of the complaint in the Underlying Suit.

The Court of Appeals in essence has made the liability of petitioner rest upon a jury's ability to determine whether or not the petitioner's officers and directors were of the *belief* that allegations of special damage were essential to petitioner's standing to seek judicial review. There can be no relevant dispute of fact on that issue.

What the petitioner *believed* were essential allegations for such standing is not and cannot be controlling. If, as a matter of law, the allegations were not essential at the time the Underlying Suit was filed, or to a reasonable man would not then have appeared essential (a question of law), it does not matter why petitioner included the allegations of special damage in the Underlying Suit. Only a court can determine the reasonableness of this legal conclusion. To leave this question of law to a jury is to endanger every litigant who seeks to correct a wrong under circumstances where the law on "standing" is at all unclear. This is contrary to the concept of the availability of the courts to every person who seeks to correct an alleged wrong.

While the Illinois Supreme Court has now ruled that interested third parties must allege and prove "special damages" to have standing to seek judicial review of a zoning variation order, that does not mean, even now, that the law is well settled as to who can sue. It will always be difficult to determine what facts constitute "special damages." Subsequent judicial determination of lack of "standing" must not be equated with lack of "probable cause" for instituting the suit.

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* Appendix C, *infra*, p. 13a.

In its briefs and arguments before the Court of Appeals, petitioner relied upon the Illinois rule which requires the judge to decide the issue of probable cause where no dispute as to the facts exists. The opinion of the Court of Appeals does not indicate whether the court considered itself bound by the Illinois rule, for no Illinois case is cited or discussed. The court's holding, that the issue of probable cause in the instant case must be submitted to the jury, is contrary to Illinois law. This Court should review the decision of the court below in order to make clear that *Byrd* v. *Blue Ridge Rural Elec. Coop.*, 356 U.S. 525 (1958), does not apply to this case, or to similar malicious prosecution suits where there could be no dispute as to the circumstances under which the original suit was instituted.*

In *Byrd,* this Court noted that the state rule at issue, which required that the judge determine a particular defense, appeared "to be merely a form and mode of enforcing the immunity, . . . and not a rule intended to be bound up with the definition of the rights and obligations of the parties." 356 U.S. at 536. While conceding that the outcome of the litigation might be substantially affected by whether the issue of statutory immunity was decided by a judge or a jury, this Court stated (356 U.S. at 537-38):

> "An essential characteristic of [the federal] system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury

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* The need for this Court's guidance in this case is shown by the statements in *"Choice of Procedure in Diversity Cases,"* 75 Yale L. J. 477 (Jan. 1966) which emphasize the desirability, indeed the absolute necessity that the federal courts refrain from frustrating state policy. It is even more essential that where, as here, federal and state policy coincide, the federal court should not be permitted to frustrate both policies by leaving to a jury the determination of probable cause where the facts, relating to respondent's conduct and upon which petitioner relied in seeking judicial review, cannot be disputed.

and, under the influence—if not the command—of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury . . . The policy of uniform enforcement of state-created rights and obligations . . . cannot in every case exact compliance with a state rule —not bound up with rights and obligations—which disrupts the federal system of allocating functions between judge and jury."

B.

The Factors Which Prompted This Court's Ruling in Byrd are not Present in This Case or Similar Malicious Prosecution Actions.

In determining whether the Illinois rule should be applied by the federal courts, the first inquiry under *Byrd* is whether the state views its rule as an integral part of the rights and obligations created by state law. The Illinois Supreme Court has indicated that the action for malicious prosecution is not favored:

> "It must be remembered that the courts are open to every citizen; and every man has a right to come into a court of justice and claim what he deems to be his right without fear of being prosecuted for heavy damages." *Smith* v. *Michigan Buggy Corp.*, 175 Ill. 619, 628, 51 N.E. 569, 571 (1898).

Giving the trial judge control of the issue of probable cause, where the evidence cannot be disputed, is an important limitation upon the cause of action for malicious prosecution. This division of function between judge and jury is an integral part of the state's policy of emphasizing freedom of access to the courts and of placing severe restrictions on recovery in actions based upon allegedly malicious lawsuits.

This court noted in *Byrd* that cases since *Erie* have developed the policy of following state rules even of form and

mode where those rules may bear substantially on the outcome of the litigation. In the instant case, the outcome will be substantially affected by whether the issue of probable cause is decided by a judge or jury. This prediction is borne out by the following explanation of why most states require that probable cause be determined by the judge:

> "The basic reason is probably to avoid a confusion of issues. The jury is likely to confuse the fact that the prior suit was unsuccessful with the real issue, which is whether the original complainant had a reasonable belief in the possible success of his action at the time he filed suit. "Liability for Malicious Institution of a Civil Suit," 1955 Wash. U.L.Q. 294, 304.

The rule set forth above, followed in Illinois, which requires the judge to decide probable cause where the facts cannot be disputed does not offset the important federal policy of having the jury decide disputed questions of fact.

C.

Resolution of the Issue of the Federal Court's Power to Direct a Verdict on Probable Cause Will Have a Necessary Impact Far Beyond the Confines of This Case.

A determination of the question of whether the federal court is bound to apply the Illinois rule in this case will affect subsequent malicious prosecution actions brought in the federal courts situated in Illinois. But the problem has larger dimensions in that "the overwhelming majority" of states adhere to the same rule—on undisputed facts, probable cause is a question of law for the courts. Annot., 87 A.L.R.2d 183, 188-192 (1963).

This question of division of function between judge and jury takes on added significance because of the constantly expanding reach of the cause of action for alleged mali-

cious institution of civil suits. The history of this cause of action has been described as follows:

> "The early common law offered a remedy to a person subjected to unjustified criminal proceedings but not to one harassed by a civil action. In time, however, an action for the malicious prosecution of a civil suit was allowed when the plaintiff had been subjected to certain extraordinary inconveniences, such as attachment, civil arrest, or involuntary bankruptcy." 75 Harv. L. Rev. 629, 630 (1962).

In the United States, courts have allowed actions for alleged malicious prosecution of civil suits not resulting in such "extraordinary inconveniences" as the three examples just cited. Prosser, Torts 663-664 (2d ed. 1955). Thus, it is imperative that there be no undermining of the Illinois rule which provides important protection to all parties who act reasonably in initiating civil suits.

> "If the courts properly exercise their function of deciding the question of probable cause, the reasonably mistaken litigant need not fear that a jury may find him liable for having initiated an unfounded action, for the court would not submit the question of his liability to a jury." "Liability for Malicious Institution of a Civil Suit," 1955 Wash. U.L.Q. 294, 309.

The net effect of the opinion of the Court of Appeals herein is that the issue of probable cause must always be submitted to the jury, even when there can be no dispute as to the facts. This ruling destroys a basic safeguard provided by directed verdicts—protection against local prejudice. As one Court of Appeals has stated:

> "A directed verdict is a device to save time and trouble involved in lengthy jury determination. It is something more. It is a method for protecting neutral

> principles of law from powerful forces outside the scope of law—compassion and prejudice." *Rutherford* v. *Ill. Central R.R.*, 278 F.2d 310, 312 (5th Cir. 1960) rehearing denied, 278 F.2d 310, cert. denied, 364 U.S. 922.

Requiring that the issue of probable cause be submitted to the jury in all cases is especially dangerous where, as here, the suit alleged to have been maliciously prosecuted is based on a claim against which the jury in the malicious prosecution case may be prejudiced. This problem might arise in connection with zoning cases which often involve fiercely-contested local issues. But it might also arise in other areas of law, for example, a suit for the alleged malicious prosecution of a civil action for injunctive relief under the public accommodations section of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000a-2000a-6 (1964). In either of such type of case the belief of the instigator of the action in his standing to sue might be subject to question, but where facts surrounding the conduct of the party against whom the action has been brought are not open to dispute, probable cause is established by those undisputed facts. Under such circumstances, probable cause is a matter for the court to determine. Here there can be no dispute as to the conduct of the respondents which led petitioner to institute the Underlying Suit on which respondents base the instant action for malicious prosecution—the question of probable cause should not be submitted to the jury.

D.

Questions Of Standing To Sue Must Not Be Permitted To Endanger The Proper Protection Of Zoning Objectives.

When local authorities grant a variation to an individual property owner, there is no one to challenge the propriety of the variation except interested third parties. The im-

portant role which third parties play in enforcing zoning laws has been described as follows:

> "In the majority of cities . . . the zoning authorities have simply not done the job of administration, enforcement, and periodic revision necessary to a sound and healthy zoning system. The burden of enforcement has fallen more and more on third parties, and narrow judicial attitudes have hampered their efforts. *Third-party litigants have been thrown out of court on questions of standing and special damages when the facts of the cases clearly indicated zoning violations.* The end products of this vicious situation are loss of zoning protection to the community at large as well as to third-party owners of developed land; continued urban blight resulting in more slums; increased cries for more federal aid for slum clearance, urban renewal, and public housing; and loss of public confidence in zoning." (emphasis added) Foss, "Interested Third Parties in Zoning," 12 U. Fla. L. Rev. 16, 23 (1959).

The trend of modern law, giving to private individuals greater responsibility for enforcing public policy, makes necessary a decision in this case that the trial court has power to decide the legal issue of petitioner's probable cause to seek judicial review of a justiciable issue, and that *Byrd* does not foreclose the federal courts from applying the salutary state court rule.

II.

The Court of Appeals, in Denying the District Court Power to Direct a Verdict on the Issue of Probable Cause, Failed to Apply State Law.

The probable cause for petitioner's seeking judicial review arises as a result of respondents' conduct. Even if this were not so, petitioner's probable cause for instituting the

action is a matter of law for the court to determine, because there is no conflicting evidence on that question.

A.

The State Of Illinois Zoning Law At The Time Petitioner's Underlying Suit Was Filed Demonstrates That Petitioner Had Probable Cause To Seek Judicial Review Of The Zoning Variation Order.

In 1953 the Illinois legislature amended the zoning statute to provide that actions to prevent zoning violations could be brought by "an owner or tenant of real property in the same contiguous zoning district as the building or structure in question." (Ill. Rev. Stat. 1953, Ch. 24, § 73-9). It was for the court to determine whether petitioner acted as a reasonable man would have acted in commencing the Underlying Suit for judicial review, interpreting this statute to mean that petitioner had the right, as the owner of property in the same zoning district as respondents' property, to sue to challenge the propriety of a variation order granted without the specific findings required by the statute. (Ill. Rev. Stat. 1955, Ch. 24, § 73-4). Not until the Illinois Supreme Court decision in the Underlying Suit did an Illinois court construe the 1953 amendment to mean that location in the same zoning district was insufficient to confer standing upon a property owner to challenge a variation. At the time petitioner instituted the Underlying Suit, it was reasonable, as a matter of law, to conclude that any property owner in the same zoning district had standing to challenge a variation order entered without the specific statutorily-required findings. To leave to a jury this issue, whether petitioner in fact believed it had standing to sue without alleging special

damage, is to do violence to a fundamental protection afforded to all litigants and is contrary to Illinois law.

Only one week before the commencement of the Underlying Suit, the Illinois Supreme Court decided a case which recognized the standing of *any neighboring property owner* to seek judicial review of a zoning variation order, without regard to any allegation or proof of special damage. *Lindburg* v. *Zoning Board of Appeals*, 8 Ill.2d 254, 133 N.E.2d 266 (1956). The court in *Lindburg* said nothing about special damages. In the only comment relevant to the issue of standing, Mr. Justice Schaefer spoke of geographic proximity:

> "Arthur R. Lindburg and 16 other owners of property in the vicinity instituted a proceeding in the circuit court of Sangamon County under the Administrative Review Act to review the action of the Board." 8 Ill.2d 254-255, 133 N.E.2d at 267 (1956).

The court in *Lindburg* held that a variation order entered by a local Zoning Board of Appeals was invalid for failure to comply with the statute requiring such orders to contain "findings of fact specifying the reason . . . for making the variation." (Ill. Rev. Stat. 1955, Ch. 24, § 73-4 Appendix C, *infra* p. 11a). The court stated:

> "The requirement of the statute is not met by parroting the highly generalized statutory phrases, 'practical difficulties' and 'particular hardships.'" 8 Ill.2d at 256, 133 N.E.2d at 268.

Because the order of the Chicago Zoning Board of Appeals granting a variation to respondents "parroted" the applicable statutory language and did not contain findings of fact specifying the reasons for allowing the variation (App. 295-98), petitioner had probable cause, under the

Lindburg decision, to conclude that the variation order was void.

B.

The Court Of Appeals Misapprehended The Record In Stating That Petitioner Had Failed To Argue In This Case That The Variation Order Was Void.

If the variation order was void, or if the petitioner had reasonable cause to believe it was void, then as a matter of law petitioner had probable cause to sue to enjoin a *violation* of the zoning ordinance under § 73-9 of Chapter 24 of the Illinois Revised Statutes. The Court of Appeals seems to have recognized the importance of this point. At the first opportunity the Court of Appeals attacks petitioner's argument, that the variation order was void, by stating "the arguments were not made in the trial court * * * at no prior time in this litigation was it urged that the variation order was void for lack of sufficient findings." (Appendix A, *infra* p. 5a)*

The use of such statements by the Court of Appeals calls into question the result herein and colors the justice of the reversal. The *entire* thrust of the Underlying Suit was that *the variation order was void for lack of specific statutorily-required findings.* Indeed, the respondents at-

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* This position is wholly contrary to the Court of Appeals' recognition in 1959 that petitioner had in fact raised this very issue. In its opinion in *LaSalle Nat'l. Bank* v. *222 East Chestnut Street Corp.*, 267 F. 2d 247 (7th Cir. 1959), cert. denied, 361 U.S. 836, the Court of Appeals commented first upon the fact that there had never, in any prior action, been any determination on the merits against the petitioner and went on to say (267 F. 2d at 254):

> "No court has passed directly on [petitioner's] claim that there had been a *violation* by [respondents] of the Chicago Zoning Ordinance." (emphasis added)

tached as an exhibit to their complaint *in this case* petitioner's complaint in the Underlying Suit, which five times attacked the validity of the variation order on the grounds that: "It is not accompanied by sufficient or adequate findings of fact." (App. 291.)

Furthermore, petitioner attached to its answer *in this case* an argument made by petitioner to the Illinois Supreme Court in obtaining the stay order in the Underlying Suit:

> *"Even if the act (Art. 73-4) as amended, were constitutional, the decision here of the board of appeals is in violation of the act because it does not contain sufficient or adequate findings of fact 'specifying the reason or reasons for making the variation' as the statute expressly requires."* (emphasis in original). (App. 86.)

How more clearly could petitioner have urged that the variation order was void? Petitioner then quoted the holding of the *Lindburg* decision, stating that it should be applied to the Underlying Suit.

In addition, petitioner's counsel specifically referred to *Lindburg* in arguing for the directed verdict herein. Petitioner's counsel argued that the variation order was "fatally defective" under *Lindburg*, because the Board's findings could not sustain such an order, saying:

> "[The Underlying Suit] was brought after the Zoning Board of Appeals had announced a variation, issued a variation using the statutory language only in its findings. Now, the law of Illinois was absolutely clear at that time that such findings could not sustain such a variation
>
> "In other words, there is no question under Judge Schaefer's opinion in the Lindburg case [*Lindburg* v.

Zoning Board of Appeals, 8 Ill. 2d 254, 133 N.E. 266 (1956)] but that the action of the Zoning Variation Board was *fatally defective* . . ." (emphasis added.) (Additional Appendix of Defendant-Appellee, p. 8)

The above record shows beyond question that petitioner has argued repeatedly in this case that the variation order was void for failure to include the statutorily-required specific findings. It would appear that, in order to punish petitioner for its legal error in analyzing Illinois law on "standing" to challenge zoning variations, the Court of Appeals has completely misapprehended what were (i) the arguments before it, (ii) the arguments in the District Court, and, indeed, (iii) the contentions in the Underlying Suit.

CONCLUSION

The opinion of the Court of Appeals is founded on irritation, it is blind to Illinois law, and constitutes a threat to all who institute litigation in any circumstances where the law of "standing" is unclear. Even beyond this, there is implicit in the rule announced a danger that other courts will apply the same erroneous test of the power of a court to direct a verdict in a malicious prosecution action.

Petitioner has acted in reliance, not upon some belief of petitioner, but upon respondents' undisputed conduct in threatening to utilize their property under an apparently void variation order. The penalty with which petitioner is now threatened is exposure to a multimillion dollar judgment if a jury is swayed by compassion or prejudice, or fails properly to distinguish between lack of success in, and a reasonable belief in the "probable cause"

for, the Underlying Suit. Only a court can properly assess the state of Illinois zoning law in 1956. To make the outcome of this action turn upon a jury's determination of petitioner's belief in the materiality of specific allegations, is wholly to distort the functions of judge and jury in a malicious prosecution action.

This case calls for a clear declaration by this Honorable Court that, in diversity actions involving claims of malicious prosecution, federal courts in deciding the issue of probable cause must apply state rules governing the division of functions between judge and jury. This Court should make clear that *Byrd* v. *Blue Ridge* does not apply to this case or to similar malicious prosecution cases.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

SAMUEL W. BLOCK
HOWARD R. BARRON
JOAN M. MCMAHAN
Counsel for Petitioner.

APPENDIX A.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 14816 SEPTEMBER TERM AND SESSION 1965

LA SALLE NATIONAL BANK, not personally but as Trustee, under Trust No. 17365, and AARON B. WEINER,
Plaintiffs-Appellants,
v.
222 EAST CHESTNUT STREET CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

OCTOBER 27, 1965

Before DUFFY, SCHNACKENBERG and KNOCH, *Circuit Judges.*

DUFFY, *Circuit Judge.* This suit was brought to recover $1,000,000 in damages for alleged malicious prosecution. It was tried to a jury. However, the trial judge granted defendant's motion for a directed verdict.

This suit is merely one chapter in a long story of litigation between the parties dating back to 1956. In order to understand the issues in the instant case, it is necessary

to set forth, as briefly as possible, some of the history of the previous litigation.

Plaintiff bank is the trustee under Trust 17365 and is land trustee of property located at 253 East Delaware Place, Chicago. Plaintiff Aaron B. Weiner is the owner of the entire beneficial interest in this trust.

Defendant (sometimes referred to as 222 Corporation) owns and operates real estate at 222 East Chestnut Street in Chicago upon which is located an apartment building. This property faces upon a different street than plaintiffs' property but is in the same neighborhood. At the nearest point, defendant's property and plaintiffs' property are 184½ feet apart.

In December 1955, plaintiffs filed an application with the Zoning Board of Appeals of Chicago for a variation from the zoning ordinance to permit the erection of an apartment building up to the front line of their property, claiming that if so erected, the building would be in direct line with all other buildings located in that block. Five hearings were held by the Board of Appeals. The defendant herein strongly objected to the requested variation. On March 13, 1956, the Board of Appeals determined that the variation should be allowed.

However, a building permit was not then issued. This was largely due to defendant's institution of three suits against plaintiffs charging a violation of the zoning ordinance of the City of Chicago. These suits may be designated as 1) Zoning violation suit which was finally determined by the Supreme Court of Illinois, *222 East Chestnut Street Corp.* v. *Board of Appeals of City of Chicago,* 10 Ill. 2d 130, 139 N.E. 2d 221; 2) the State Court injunction suit finally determined by the Appellate Court of Illinois, First Division, 15 Ill. App. 2d 460, 146 N.E. 2d 717, and 3) The federal court injunction suit which was finally determined by this Court, 253 F.2d 484. The defendant, 222 Corporation, was unsuccessful in all three cases at all court levels.

Suit 1 has been referred to in this litigation as the "Underlying Suit." In that case, 222 Corporation brought

an action in the Superior Court of Cook County seeking to reverse the action of the Chicago Zoning Board of Appeals in granting a variation. The Superior Court affirmed the Board's decision and 222 Corporation appealed directly to the Illinois Supreme Court which in turn, affirmed the decree of the Superior Court, holding that 222 Corporation had not proved it had or would suffer any injury by reason of the building's construction.

In Suit (2), the State Court injunction suit, 222 Corporation sought to restrain plaintiffs from constructing their garage building up to the rear lot line of plaintiffs' property hereinbefore described. The Illinois Appellate Court affirmed, again on the ground that 222 Corporation had failed to establish it would be injured by reason of the proposed construction.

222 Corporation then filed the federal court injunction suit again seeking to restrain plaintiffs from constructing the apartment building in accordance with the variance. This suit made no reference to the Underlying Suit, but urged that plaintiffs were violating the zoning ordinance. The United States District Court dismissed the suit and this Court affirmed, stating that the matter had been conclusively settled in the Underlying Suit.

After the Underlying Suit had been terminated, plaintiffs brought suit against 222 Corporation on the $60,000 bond which had been posted for the supersedeas and stay order. The District Court entered judgment for the full amount of the bond. This Court affirmed the judgment reversing only that portion thereof that had awarded interest and attorney fees. *Weiner* v. *222 East Chestnut Street Corporation,* 303 F.2d 630.

The instant case was tried to a jury. Plaintiffs produced testimony and exhibits showing the physical relationship between plaintiffs' and defendant's property. Plaintiffs also produced evidence tending, at least, to prove that material allegations in 222 Corporation's complaint in the Underlying Suit were not true, and that 222 Corporation's officers knew that they were untrue.

The trial court separated the questions of probable cause and damages. It was on the question of probable cause that the District Court directed a verdict favoring 222 Corporation. Therefore, the issue to be determined here is whether or not there was sufficient evidence of defendant's lack or want of probable cause in bringing the prior suits to warrant submission of this question to the jury.

It is, of course, fundamental that in a malicious prosecution suit, the complaint must allege a lack of probable cause. The proof of such element is usually evidentiary in nature. *La Salle National Bank* v. *222 East Chestnut Corporation,* 7 Cir., 267 F.2d 247, cert. den. 361 U.S. 836, 80 S.Ct. 88, 4 L.Ed. 2d 77.

It is also fundamental that in determining the propriety of a directed verdict, the evidence and the inferences arising therefrom must be viewed in the light most favorable to the opposing party. *Pinkowski* v. *Sherman Hotel,* 7 Cir., 313 F.2d 190, 192. This general rule is applicable to malicious prosecution suits. *Brandt* v. *Pennsylvania Railroad Company,* 7 Cir., 231 F.2d 848, 851, 57 A.L.R. 2d 1078, and *Steuber* v. *Admiral Corporation,* 7 Cir., 171 F.2d 777, 779.

Plaintiffs state that their theory of this case is that "defendant's complaint in the Underlying Suit was false; more specifically, that defendant lacked probable cause for alleging the special damages referred to, the allegations which were necessary to give it any standing and right to come into court at all. These, as we have seen, were the allegations which turned out ultimately to be decisive."

We have previously taken note of the many suits started by defendant against plaintiffs herein. We said "It must be admitted that the suits brought by 222[1] were prosecuted with vigor and enthusiasm. A love of litigation might even be inferred." *La Salle National Bank* v. *222 East Chestnut Street Corporation* (1959), 267 F.2d 247, 254. In that same opinion, we pointed out that we were not passing

[1] In this opinion, 222 East Chestnut Corporation is usually referred to as "222 Corporation" or "defendant."

on several questions discussed in the briefs including "want of probable cause" and "malice."

Defendant places much emphasis upon its stated beliefs that the variation order was void and that it had standing to sue under the Cities and Villages Act. However, these arguments were not made in the trial court. In fact, this claim would seem to be in contradiction of 222 Corporation's argument in the District Court. Furthermore, at no prior time in this litigation was it urged that the variation order was void for lack of sufficient findings.

Defendant argues that proof of specific damages was thought by defendant to be unnecessary when the Underlying Suit was commenced. Nevertheless, the fact remains that such allegations were included in the complaint in considerable detail.

Defendant says it was misled by some previous decisions of the Illinois Supreme Court, but it is undisputed that after the decision of the Illinois Supreme Court in the Underlying Suit, defendant continued and reaffirmed its policy of objecting to and resisting all applications upon behalf of properties in the neighborhood for zoning variations or special uses.

Under the evidence presented, a jury might have concluded the allegations of special damages were included in the complaint because the officers and defendants of 222 East Chestnut were of the belief that without them, 222 East Chestnut would have no standing to seek review under the Administrative Review Act.

The allegations of special damages are in the complaint in the Underlying Suit. The defendant put them there. The Illinois Supreme Court held they were material. In fact, so material, that lack of proof of these allegations caused them to lose the lawsuit.

Upon the basis of 222 East Chestnut's allegation in its complaint that its light, air and fire protection would be interfered with; that its taxable value would be diminished and that traffic congestion would be increased in front of

its premises, defendant herein obtained a temporary stay order which prevented plaintiffs herein from using their property for construction purposes for a period of 146 days.

For a period of more than five years, plaintiffs have been brought through trial and appellate courts, state and federal. Defendant's suits have prevented plaintiffs from using their property as planned. Under all the circumstances, we hold plaintiffs were entitled to have a jury pass upon their contentions. Plaintiffs were entitled to their full day in court.

We hold the District Court's order directing a verdict in favor of defendant was error and should be and is hereby reversed and remanded for further proceedings not inconsistent with this opinion.

REVERSED and REMANDED

APPENDIX B.

Other Suits Between The Parties, None Of Which Is Relevant Here.

The respondents have instituted three actions against the petitioner and petitioner has brought an equal number against the respondents. In their opening brief before the Court of Appeals, respondents clearly state that the only action which they allege to have been maliciously prosecuted is petitioner's suit for judicial review of the zoning variation order. The other suits have been a source of some confusion in the present case, as indicated by the following language used by the Court of Appeals:

> "Therefore, the issue to be determined here is whether or not there was sufficient evidence of defendant's lack or want of probable cause in bringing the *prior suits* to warrant submission of this question to the jury." (emphasis added.) (Appendix A, *supra*, p. 4a.)

The reference to "prior suits" is clearly incorrect as only one action is at issue here.

The following is a brief summary of the six suits between the parties.

1. Petitioner filed an action on March 29, 1956, seeking judicial review of the zoning variation order. The trial court affirmed the zoning board's decision on the ground that it was supported by the manifest weight of the evidence. Respondents started construction work at 253 East Delaware Place while petitioner's appeal was pending before the Illinois Supreme Court. Petitioner obtained a supersedeas and stay order from the Illinois Supreme Court which prohibited further construction pending the disposition of the appeal. Petitioner was required by the order to post a $60,000 bond. On November 26, 1956, the Illinois Supreme Court held that petitioner lacked standing to

bring the action. The Court's opinion was based on that ground alone—without passing on or considering the merits or petitioner's contention that the zoning variation order was void for lack of statutorily-required findings of fact. 10 Ill.2d 132, 139 N.E.2d 218 1956. The instant malicious prosecution suit is based only upon this suit.

2. During the hearings before the Zoning Board of Appeals, petitioner argued that respondents were not complying with an ordinance which precluded a property owner from building to the rear lot line. (App. 180.) The Board construed the applicable ordinance to mean that respondent had a right to build an attached garage extending to the rear lot line. On March 8, 1956, petitioner filed in a state court an action for an injunction restraining respondents from building to the rear lot line. The trial court specifically found that petitioner was a proper person to sue under Section 73-9 of the Illinois Cities and Villages Act. On appeal, it was held that petitioner was not entitled to injunctive relief because it had not proved special damages. 15 Ill. App.2d 460, 146 N.E.2d 717 (1957).

3. Respondents filed their first malicious prosecution suit again petitioner on September 27, 1956. (App. 113.) That action, which alleged essentially the same matters as the instant suit, was dismissed by the Federal District Court on July 24, 1957, on the ground that respondents had not alleged that petitioner had specifically interfered with their property. (App. 113.) Although respondents moved to reinstate the action, they subsequently withdrew that motion. (App. 114, 117.)

4. On January 30, 1957, petitioner filed a complaint in the federal court for an injunction restraining respondents from proceeding with construction. (App. 309-319.) As the Court of Appeals for the Seventh Circuit has noted, neither in petitioner's original suit nor in the state court injunction suit did the petitioner have a hearing on the merits of its claim. *LaSalle Nat'l Bank* v. *222 East Chestnut Street Corp.*, 267 F.2d 247, 254 (7th Cir. 1959).

"With that in mind, and seeking a remedy somewhere, [petitioner] came to the federal court with the third case, . . ." (App. 184.)

5. Respondents commenced another action against petitioner on August 29, 1957. This second suit was based upon the supersedeas and stay order entered by the Illinois Supreme Court. Respondents recovered a judgment for $60,000, the amount of petitioner's bond.

6. While the action on the supersedeas bond was pending, respondents filed the instant, their third, action based upon the same allegations as their first malicious prosecution action.

APPENDIX C

Illinois Revised Statutes—1955

Chapter 24—Cities and Villages—Article 73—Special Powers—Zoning

73—1 § 73-1. **Objectives of article—Classification, regulation and location of uses, structures—Elimination of non-conforming uses, etc.)** To the end that adequate light, pure air, and safety from fire and other dangers may be secured; that the taxable value of land and buildings throughout the municipality may be conserved, that congestion in the public streets may be lessened or avoided, and that the public health, safety, comfort, morals, and welfare may otherwise be promoted, the corporate authorities in each municipality have the following powers:

• • •

73—4. § 73-4. **Enforcement officers—Board of Appeals.)** (a) In municipalities of 500,000 or more population, the regulations authorized by this Article may be varied in their application only by the board of appeals of the municipality, subject to the power of the corporate authorities to prohibit, in whole or in part, the granting of variations in respect to the classification, regulation and restriction of the location of trades and industries and the location of buildings designed for specified industrial, business, residential and other uses. Variations shall be permitted by the board of appeals only when they are in harmony with the general purpose and intent of the regulations and only in cases where there are practical difficulties or particular hardship in the way of carrying out the strict letter of any of those regulations relating to the use, construction, or alteration of buildings or structures or the use of land. In its consideration of the standards of practical difficulties or particular hardship, the board of appeals shall require evidence that (1) the property in question cannot yield a reasonable return if per-

mitted to be used only under the conditions allowed by the regulations in that zone; and (2) the plight of the owner is due to unique circumstances; and (3) the variation, if granted, will not alter the essential character of the locality. A variation shall be permitted only if the evidence, in the judgment of the board of appeals, sustains each of the three conditions enumerated. The corporate authorities may provide general or specific rules implementing, but not inconsistent with, the rules herein provided to govern determinations of the board of appeals. A decision of the board of appeals shall not be subject to review, reversal or modification by the corporate authorities but shall be judicially reviewable under the provisions of Section 73—6.01.

• • •

(e) Every variation, whether made by the board of appeals directly, or by an ordinance after a hearing before the board of appeals, shall be accompanied by findings of facts specifying the reason or reasons for making the variation. • • •

73—6.01. **Review**] § 73—6.01. All final administrative decisions of the board of appeals under this Article shall be subject to judicial review pursuant to the provisions of the "Administrative Review Act", approved May 8, 1945,[1] and all amendments and modifications thereof, and the rules adopted pursuant thereto. The term "administrative decision" is defined as in Section 1 of the "Administrative Review Act."[2] Added by act approved July 30, 1949. L. 1949, p. 568. • • •

73—9. § 73-9. **Proceedings to prevent violation.)** In case any building or structure is constructed, reconstructed, altered, repaired, converted, or maintained, or any building, structure, or land is used in violation of this article, or of any ordinance or other regulation made under the authority conferred thereby, the proper local authorities of the municipality, or any owner or tenant of real property in the same contiguous zoning district as the building or structure in question, in addition to other

remedies, may institute any appropriate action or proceeding (1) to prevent the unlawful construction, reconstruction, alteration, repair, conversion, maintenance, or use, (2) to prevent the occupancy of the building, structure, or land, (3) to prevent any illegal act, conduct, business, or use in or about the premises, or (4) to restrain, correct, or abate the violation. When any such action is instituted by an owner or tenant, notice of such action shall be served upon the municipality at the time suit is begun, by serving a copy of the complaint on the chief executive officer of the municipality, no such action may be maintained until such notice has been given.

In any action or proceeding for a purpose mentioned in this section, the court with jurisdiction of such action or proceeding has the power and in its discretion may issue a restraining order, or a preliminary injunction, as well as a permanent injunction, upon such terms and under such conditions as will do justice and enforce the purposes of this article.

If a permanent injunction is decreed in any action or proceeding for a purpose mentioned in this section, the court in its decree may, in its discretion, allow the plaintiff a reasonable sum of money for the services of the plaintiff's attorney. This allowance shall be a part of the costs of the litigation assessed against the defendant, and may be recovered as such. As amended by act approved June 24, 1953. L.1953, p. 431.

• • •

Chapter 110 — Administrative Review Act.

AN ACT in relation to judicial review of decisions of administrative agencies. Approved May 8, 1945. L.1945, p. 1144.

• • •

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

271. § 8. **(Defendants.)** In any action to review any final decision of an administrative agency, the administra-

tive agency and all persons, other than the plaintiff, who were parties of record to the proceedings before the administrative agency shall be made defendants.

272. § 9. **Pleadings and record on review.)** (a) **Complaint.)** The complaint shall contain a statement of the decision or part thereof sought to be reviewed. It shall specify whether the transcript of evidence, if any, or what portion thereof, shall be filed by the agency as part of the record. Upon motion of any defendant, or upon its own motion, the court may require of the plaintiff a specification of the errors relied upon for reversal.

(b) **Answer.)** Except as herein otherwise provided, the administrative agency shall file an answer which shall consist of the original or a certified copy of the entire record of proceedings under review, including such evidence as may have been heard by it and the findings and decisions made by it. By order of court or by stipulation of all parties to the review, the record may be shortened by the elimination of any portion thereof. If the complaint specifies that none or only a part of the transcript of evidence shall be filed as part of the answer and if the administrative agency or any other defendant objects thereto, the court shall hear the paries upon this question and make a finding as to whether all, or if less than all, what parts of the transcript shall be included in the answer. No pleadings other than as herein enumerated shall be filed by any party unless required by the court.

(c) **Record after remandment.)** If the cause is remanded to the Administrative Agency and a review shall thereafter be sought of the administrative decision, the original and supplemental record, or so much thereof as shall be determined by court order or the stipulation of all the parties, shall constitute the record on review.

* * *

274. § 11. **Scope of review.)** Every action to review any final administrative decision shall be heard and deter-

mined by the court with all convenient speed. The hearing and determination shall extend to all questions of law and of fact presented by the entire record before the court. No new or additional evidence in support of or in opposition to any finding, order, determination or decision of the administrative agency shall be heard by the court. The findings and conclusions of the administrative agency on questions of fact shall be held to be prima facie true and correct.

APPENDIX D.

Order For Supersedeas By Justice Schaefer, Supreme Court Of Illinois

State of Illinois.

IN THE SUPREME COURT OF ILLINOIS.

222 East Chestnut Street Corporation, a corporation of Delaware, *Plaintiff-Appellant,* *vs.* Board of Appeals of the City of Chicago, LaSalle National Bank, etc., Aaron B. Weiner, et al., *Defendants-Appellees.*	No. 34210 Appeal from Superior Court of Cook County No. 56-S-5518

ORDER.

This day came Joseph F. Elward and Edward S. Macie, as attorneys for plaintiff-appellant; and Goldberg, Devoe & Shadur and Abner J. Mikva as attorneys for LaSalle National Bank, not personally but as trustee under its Trust No. 17365, Leo S. Hirschfeld and Aaron B. Weiner, defendants-appellees. And this cause coming on to be heard on the motion of plaintiff-appellant for a supersedeas and stay order and upon the written objections thereto of said defendants-appellees, and argument having been heard,

It Is Ordered That a supersedeas issue and that all proceedings in the Superior Court of Cook County Case No. 56-S-5518, the Board of Appeals of the City of Chicago Case No. 16-56-Z, and the office of the Commissioner of Buildings of the City of Chicago, in connection with the erection of the structure at 247-253 E. Delaware Place, Chicago, and all action by defendants-appellees LaSalle National Bank, not personally, but as trustee under Trust Agreement dated Dec. 28, 1954 and known as Trust No. 17365, Leo S. Hirschfeld, and Aaron B. Weiner, in and

about the erection of said structure, be and the same hereby are stayed pending the final disposition of this cause, provided, however, that this order of supersedeas and stay is conditioned upon plaintiff's furnishing its bond in the penal sum of $60,000 with some surety company duly licensed to act as such in Illinois, as surety thereon, conditioned for the payment to said LaSalle National Bank, not personally but as trustee under Trust Agreement dated December 28, 1954 and known as Trust No. 17365, Leo S. Hirschfeld and Aaron B. Weiner of any and all costs, and interest in case the judgment is affirmed, and conditioned also for the payment of any and all damages suffered by LaSalle National Bank, not personally but as trustee under Trust Agreement dated Dec. 28, 1954 and known as Trust No. 17365, Leo S. Hirschfeld and Aaron B. Weiner, by reason of any delay arising from the granting of said supersedeas and stay, in case the judgment is affirmed.

2. It Is Further Ordered that the time for filing abstract and brief in this cause be shortened as follows:

(a) Abstract and Brief of plaintiff-appellant on or before September 14, 1956;

(b) Brief of defendants-appellees, on or before September 24, 1956;

(c) Reply brief on plaintiff-appellant on or before October 2, 1956.

3. It Is Further Ordered That this cause be set on the call for oral argument for September 26, 1956.

4. And plaintiff tenders herewith its said bond in the penal sum of $60,000 with Maryland Casualty Company, a corporation, surety thereon, and it is ordered that said bond be and the same hereby is approved.

5. It is further ordered that the Clerk of this Court issue such writs pursuant to the terms of this order as shall be proper to ensure the carrying out thereof.

Enter:

/s/ Walter V. Schaefer,
Justice of the Supreme Court of Illinois.

Dated: September 5, 1956.